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10 UNITED STATES BANKRUPTCY COURT
11 NORTHERN DISTRICT OF CALIFORNIA - SANTA ROSA DIVISION

12 In re

13 BENJAMIN ROBERT GONGORA AND
14 MARILYN ABIGAIL GONGORA,

15 Debtor(s).

Case No.08-12670-AJ

Chapter 7

R.S. No. JBA-1938

MOTION FOR RELIEF FROM
AUTOMATIC STAY
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

DATE: January 14, 2010
TIME: 9:00am

99 South "E" Street
Santa Rosa, CA 95404-6524

16 Wells Fargo Bank, NA ("Movant"), moves this court for an order terminating the
17 automatic stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence and continue all
18 acts necessary to enforce its security interest in real property generally described as 10933 E
19 Clovis Avenue, Mesa, Arizona 85208.

20 On or about December 12, 2008, Benjamin Robert Gongora and Marilyn Abigail
21 Gongora ("Debtors") filed a voluntary petition under Chapter 7 of the Bankruptcy Code, and
22 Timothy W. Hoffman was appointed as Chapter 7 Trustee. As a result of said filing, certain acts
23 and proceedings against Debtors and the bankruptcy estate are stayed as provided in 11 U.S.C.
24 § 362.
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1 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and
2 362(d)(2).

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I.**

5 **MOVANT IS ENTITLED TO RELIEF FROM THE**
6 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**

7 **NO EQUITY**

8 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the
9 debtor does not have any equity in the property and the property is not necessary to the debtor's
10 effective reorganization.

11 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:
12 § 362(d)(2) reflects congressional intent to allow creditors to
13 immediately proceed against the property where the debtor has no
14 equity and it is unnecessary to the reorganization, even where the
15 debtor can provide adequate protection under § 362(d)(1).
(Emphasis added).
Id. at 610 (emphasis added).

16 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court
17 stated that in determining whether equity exists in the property for purposes of § 362(d)(2), all
18 encumbrances are totalled, whether or not all the lienholders have joined in the request for relief
19 from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194
20 (9th Cir. 1984).

21 An appropriate cost of sale factor should also be added to determine if the debtor has
22 any equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R.
23 283, 289 (Bankr. S.D. Cal. 1982).

24 On or about November 16, 2004, Debtors, for valuable consideration, made, executed
25 and delivered to Movant a Note in the principal sum of \$118,400.00 (the "Note"). Pursuant to
26 the Note, Debtors are obligated to make monthly principal and interest payments commencing
27 January 1, 2005, and continuing until December 1, 2034, when all outstanding amounts are due
28 and payable. The Note provides that, in the event of default, the holder of the Note has the

1 option of declaring all unpaid sums immediately due and payable. A true and correct copy of
2 the Note is attached to the Declaration in Support of Motion for Relief From Automatic Stay as
3 exhibit A and incorporated herein by reference.

4 On or about November 16, 2004, the Debtors made, executed and delivered to Movant a
5 Deed of Trust (the "Deed of Trust") granting Movant a security interest in real property
6 commonly described as 10933 E Clovis Avenue, Mesa, Arizona 85208 (the "Real Property"),
7 which is more fully described in the Deed of Trust. The Deed of Trust provides that attorneys'
8 fees and costs incurred as a result of the Debtors' bankruptcy case may be included in the
9 outstanding balance under the Note. The Deed of Trust was recorded on November 29, 2004,
10 in the Official Records of Maricopa County, State of Arizona. A true and correct copy of the
11 Deed of Trust is attached to the Declaration in Support of Motion for Relief From Automatic
12 Stay as exhibit B and incorporated herein by reference.

13 The obligation under the Note is in default as of October 1, 2009, for failure to make
14 payments to Movant. As of December 8, 2009, the total obligation due and owing under the
15 Note is in the approximate amount of \$111,461.71, representing the principal balance of
16 \$109,711.76, interest in the sum of \$1,587.35, late charges in the amount of \$132.60, and a
17 recoverable balance in the amount of \$30.00. This is an approximate amount for purposes of
18 this Motion only, and should not be relied upon as such to pay off the subject loan as interest
19 and additional advances may come due subsequent to the filing of the Motion. An exact payoff
20 amount can be obtained by contacting Movant's counsel. Further, Movant has incurred
21 additional post-petition attorneys' fees and costs in bringing the instant Motion. Moreover, the
22 total arrears under the Note are in the approximate sum of \$2,121.63, excluding the post-
23 petition attorneys' fees and costs incurred in filing the instant Motion. A true and correct copy
24 of the contractual payment accounting pursuant to Local Rule 4001-1(g)(1) is attached to the
25 Declaration in Support of Motion for Relief From Automatic Stay as exhibit C and incorporated
26 herein by reference.

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1 **II.**

2 **RELIEF FROM STAY**

3 **LACK OF EQUITY**

4 Movant is informed and believes that, based on the Debtors' bankruptcy Schedules and
5 Statements, the fair market value of the Property is approximately \$135,000.00. True and
6 correct copies of the Debtors' bankruptcy Schedules "A" and "D" are collectively attached to
7 the Declaration in Support of Motion for Relief From Automatic Stay as exhibit D and
8 incorporated herein by reference.

9 Based on the above, Movant maintains that the equity in the Property is as follows:

Fair Market Value:	\$135,000.00
Less:	
Movant's Trust Deed	\$111,461.71
Umpqua Bank's Trust Deed	\$324,195.40
Wells Fargo Bank, N.A.'s Trust Deed	\$98,398.00
Costs of Sale (8%)	<u>\$10,800.00</u>
Equity in the Property:	\$<409,855.11>

14 As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since
15 this is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is
16 entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

17 **III.**

18 **MOVANT IS ENTITLED TO RELIEF FROM THE**
19 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).**

20 **CAUSE - LACK OF ADEQUATE PROTECTION**

21 Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to
22 adequate protection of its interest in the Property.

23 Movant submits that adequate protection in this case requires normal and periodic cash
24 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed
25 to Movant, including all attorneys' fees and costs incurred in the filing of this motion.

26 Movant is informed and believes that Debtors are presently unwilling or unable to
27 provide adequate protection to the Movant and there is no probability that adequate protection
28 can be afforded to Movant within a reasonable time.

1 By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.
2 § 362(d)(1), based upon the failure of Debtors to provide adequate protection to Movant.

3 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

4 1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the
5 enforcement by Movant of all of its rights in the Real Property under the Note and the Deed of
6 Trust;

7 2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

8 3. Granting Movant leave to foreclose on the Real Property and to enforce the
9 security interest under the Note and the Deed of Trust, including any action necessary to obtain
10 possession of the Property;

11 4. Permitting Movant to offer and provide Debtors with information re: a potential
12 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan
13 Workout/Loss Mitigation Agreement, and to enter into such agreement with Debtors;

14 5. Alternatively, in the event this court declines to grant Movant the relief requested
15 above, Movant requests that an Order for adequate protection be issued, requiring the Debtors to
16 reinstate and maintain in a current condition all obligations due under the Note and Deed of
17 Trust and all other deeds of trust encumbering the Real Property, including Debtors' obligations
18 to pay when due (a) the monthly installments of principal and interest, as required under the
19 Note; (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtors
20 in order to protect Movant's interest in the Real Property, including all attorneys' fees and costs
21 incurred in the filing of this motion;

22 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion
23 be included in the outstanding balance of the Note as allowed under applicable non-bankruptcy
24 law; and

25 7. For such other and further relief as the court deems just and proper.

26 Dated: December 21, 2009

PITE DUNCAN, LLP

27 /s/ KATHERINE L. JOHNSON (CA SBN 259854)
28 Attorneys for WELLS FARGO BANK, NA